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6 **UNITED STATES DISTRICT COURT**
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8 **SOUTHERN DISTRICT OF CALIFORNIA**

9 JESUS ROMERO, a Minor, by and
10 through his Guardian ad Litem,
11 MERIDA RAMOS,

12 Plaintiff,

13 v.

14 S. SCHWAB COMPANY, INC.; RL
15 CHILDRENSWEAR COMPANY,
16 LLC; SYLVIA COMPANY, LLC;
17 CUNY ASSOCIATES, LLC; AND LM
18 SERVICES LLC.

19 Defendants.
20

) Case No. 15-CV-815-GPC-MDD

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) **ORDER GRANTING IN PART**

) **AND DENYING IN PART**

) **DEFENDANTS' MOTION TO**

) **BIFURCATE THE TRIAL**

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) **[Dkt. No. 146.]**

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22 Before the Court is Defendants' motion to bifurcate the trial so that liability is
23 tried separately on the issue of damages, including punitive damages. (Dkt. No.
24 146.) Plaintiff filed an amended opposition, (Dkt. No. 170), and Defendants filed a
25 reply, (Dkt. No. 174). Based on the reasoning below, the Court GRANTS in part
26 and DENIES in part Defendants' motion to bifurcate the trial.

27 **Background**

28 On January 30, 2005, Plaintiff Jesus Romero and his family were planning an

1 outing to Rosarito, Mexico. Jesus, who was seven years old, and his younger
2 brother, Marcos, who was six years old, were dressed and ready, and went next door
3 to a neighbor's house to use a lighter. Both were sitting down and while Jesus held
4 a flower or green weed, Marcos lit the flower or weed with the lighter. Jesus
5 testified that he let go of the flower or weed because his fingers got hot and the lit
6 flower or weed landed on his shirt near his stomach. Jesus told his brother to go get
7 help so Marcos ran into the house and their father came out, ripped the shirt off,
8 dropped it to the concrete and stepped on it to extinguish the flames. Jesus suffered
9 second and third degree burns covering about 25% of his body. (Dkt. No. 128, Am.
10 PTO at 5¹.)

11 On the day of the incident, Jesus was wearing a boy's short-sleeved Ralph
12 Lauren red-and-white gingham button-down dress shirt ("Shirt"). Jesus' mother
13 Merida, only bought 100% cotton clothing for her family and would not have
14 purchased the Shirt if it had not been labeled 100% cotton.

15 Jesus alleges that 1) Defendants manufactured the shirt; and 2) although the
16 Shirt was labeled 100% cotton, it was not; instead, it was composed of a "highly
17 flammable, dangerous, and unlawful blend" of 90% cotton, 5% rayon, and 5% nylon
18 causing Jesus more severe burns than he would have suffered if the shirt had been
19 100% cotton. Plaintiff alleges causes of action for strict product liability for
20 manufacturing defect; negligence; breach of warranty; and negligent
21 misrepresentation against Defendants. (Dkt. No. 17, FAC; Dkt. No. 128, Am.
22 PTO.) Defendants contend that they did not manufacture the Shirt, the Shirt was
23 labeled correctly and made out of 100% cotton, and they are not liable for Jesus'
24 injuries.

25 Discussion

26 Federal Rule of Civil Procedure ("Rule") 42(b) empowers the Court to
27

28 ¹ Page numbers are based on the CM/ECF pagination.

1 bifurcate trials “[f]or convenience, to avoid prejudice, or to expedite and
2 economize.” Fed. R. Civ. P. 42(b). Bifurcation is an exception to normal trial
3 procedure, Clark v. I.R.S., 772 F. Supp. 2d 1265, 1269 (D. Haw. 2009) (citing
4 Hangarter v. Provident Life & Acc. Ins. Co., 373 F.3d 998, 1021 (9th Cir. 2004),
5 and, as such, the moving party bears the burden of showing that bifurcation is
6 warranted. Spectra-Physics Lasers, Inc. v. Uniphase Corp., 144 F.R.D. 99, 101
7 (N.D. Cal. 1992). In the Ninth Circuit, district courts consider several factors,
8 including: (1) “separability of the issues,” (2) “simplification of discovery and
9 conservation of resources,” and (3) “prejudice to the parties.” McDermott v. Potter,
10 No. 07-cv-6300-SI, 2010 WL 956808, at *1 (N.D. Cal. Mar. 12, 2010) (citations
11 omitted). The district court has broad discretion in determining whether to
12 bifurcate. Hangarter, 373 F.3d at 1021. A court may elect “to bifurcate a trial to
13 permit deferral of costly and possibly unnecessary proceedings pending resolution
14 of potentially dispositive preliminary issues.” Jinro America Inc. v. Secure Inv.,
15 Inc., 266 F.3d 993, 998 (9th Cir. 2001).

16 In this case, Defendants seek to bifurcate the trial between liability and
17 damages, including punitive damages arguing they will be prejudiced and
18 bifurcation will promote judicial economy and avoid jury confusion. Plaintiff
19 argues that bifurcation will prejudice them and will only prolong the trial which will
20 result in a waste of additional resources for the parties and the Court.

21 **A. Separability**

22 Defendants argue that there is little overlap in the evidence to be presented as
23 the three liability questions are whether Defendants made the Shirt, the fiber
24 composition of the Shirt and whether the Shirt was dangerously flammable.
25 Plaintiff opposes contending that the liability and damages issues are intertwined as
26 the experts will testify concerning the flammability characteristics and burning
27 behavior of the Shirt and the damages that resulted. It is inherently impossible to
28 separate testimony about the burning characteristics of the combination of low-

1 grade fibers in the Shirt from the manner in which Plaintiff was engulfed by the fire
2 and the severe and permanent injuries suffered.

3 District courts have declined motions to bifurcate when an element needed to
4 demonstrate liability also include a showing of damages. See Leite v. Severstal
5 Sparrows Point, LLC, Nos. WDQ-09-0742, WDQ-09-1158, 2010 WL 5148423, at
6 *2 (D. Md. Dec. 10, 2010) (“[b]ecause deciding a negligence claim requires a
7 damages analysis, ‘liability cannot be resolved without calculating damages to some
8 degree.’”); Southwest Stainless, L.P. v. Sappington, No. 07-CV-334-CVE-FHM,
9 2008 WL 1777476, at *6 (N.D. Okla. Apr. 17, 2008) (denying motion to bifurcate
10 because, *inter alia*, issue of liability cannot be separated from damages since
11 damages is a required element of the contract and tort-based claims.). Bifurcation is
12 also inappropriate when evidence to prove liability and damages overlap. See Ohio
13 Six Limited v. Motel 6 Operating L.P., Case No. CV 11-8102 MMM(Ex), 2013 WL
14 12125747, at *5 (C.D. Cal. Aug. 7, 2013) (overlap in the evidence that will be used
15 to prove liability and damages did not warrant bifurcation); Leite, 2010 WL
16 5148423, at *2 (denying motion to bifurcate liability and damages because evidence
17 on liability and damages overlap); Coryn Group II, LLC v. O.C. Seacrets, Inc.,
18 Civil. No. WDQ-08-2764, 2011 WL 5825689, at *2 (D. Md. 2011) (bifurcation
19 inappropriate when evidence on liability and damages overlaps).

20 Plaintiff’s claims for negligence, manufacturing defect and negligent
21 representation all require a showing of damages/injuries. Negligence requires a
22 showing of (1) duty; (2) breach; (3) causation; and (4) damages.” Ileto v. Glock,
23 Inc., 349 F.3d 1191, 1203 (9th Cir. 2003). A claim for manufacturing defect
24 requires a showing that a manufacturing defect is “a substantial factor in producing
25 the injury.” Garrett v. Howmedica Osteonics Corp., 214 Cal. App. 4th 173, 190
26 (2013) (citation omitted). “The elements of negligent misrepresentation are (1) the
27 misrepresentation of a past or existing material fact, (2) without reasonable ground
28 for believing it to be true, (3) with intent to induce another's reliance on the fact

1 misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting
2 damage.” Apollo Capital Fund, LLC v. Roth Capital Partners, LLC, 158 Cal. App.
3 4th 226, 243 (2007). Because damages/injuries are necessary elements to prove
4 liability on Plaintiff’s causes of action, the issue of separability does not favor
5 bifurcation. Moreover, the witness testimonies to prove both liability and damages
6 will overlap since the experts will be testifying not only on the fiber composition,
7 and flammability characteristics of the Shirt but also the severity of Plaintiff’s
8 injuries as Plaintiff is claiming he suffered more severe injuries due to the blended
9 fabric than he would have suffered if the Shirt had been 100% cotton. Therefore,
10 because the evidence will overlap to demonstrate liability and damages, separability
11 does not favor bifurcation.

12 **B. Prejudice**

13 Defendants argue that bifurcation is warranted because combining evidence
14 of liability and damages may lead the jury to find them liable simply by hearing the
15 damages testimony despite the overwhelming evidence that the Shirt is 100%
16 cotton. They argue there is a very high risk that a jury will impose liability based on
17 emotionally charged testimonies about Plaintiff’s second to third degree burn
18 injuries he suffered when he was seven years old, and not on the evidence. Plaintiff
19 responds that while he does not disagree that his burn injuries are “extraordinary”
20 he will be prejudiced because he will need to prove the manner and severity of his
21 burn injuries to establish liability and whether the shirt was dangerously flammable.
22 Moreover, bifurcation will prolong the trial and subject Plaintiff and his family to
23 recount the painful events of the day twice and require him to incur additional costs
24 for expert witnesses to provide testimonies in two trials.

25 While the potential for prejudice exists based on the severe injuries suffered
26 by Plaintiff who was a boy at the time, such prejudice exists in any tort-based case
27 where injuries are suffered. However, any potential prejudice can be addressed by
28 an appropriate jury instruction. See Hamm, 888 F. Supp. at 1039 (“any concerns

1 about potential prejudice to the defendant may be directly addressed, and the
2 prejudice cured, with appropriate limiting instructions.”); Pouliot v. Paul Arpin Van
3 Lines, Inc., 235 F.R.D. 537, 542-43 (D. Conn. 2006) (request for bifurcation was
4 denied and trial court instructed jury that its verdict should not be influenced by
5 sympathy for the plaintiff); Coryn Group II, LLC, 2011 WL 5825689, at *3
6 (prejudice in a single trial on damages and liability mitigated by jury instructions
7 addressing concerns about the improper use of evidence). This factor does not
8 favor bifurcation.

9 **C. Judicial Economy**

10 Defendants assert that bifurcation of the liability issue will promote judicial
11 economy because there will be little overlap with the evidence concerning liability
12 and damages. Plaintiff disagrees and argues that bifurcation will lead to waste of
13 judicial resources because the evidence in the liability phase will be the same as in
14 the damages phase and bifurcation will only prolong the trial and increase costs.

15 As noted above, judicial economy would not be promoted because the issue
16 of damages/injures is a necessary element of the liability causes of action and the
17 same witnesses will testify concerning liability and damages.

18 In sum, the Court DENIES Defendants’ motion to bifurcate the issues of
19 liability and damages.

20 **D. Punitive Damages**

21 Defendants also seek to bifurcate the issue of punitive damages arguing they
22 will be prejudiced if they have to disclose their financial condition² before liability

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24 ² In California, proof of the defendant’s financial condition is required when punitive damages are
awarded. California Civil Code section 3295 provides,

25 (d) The court shall, on application of any defendant, preclude the admission of
26 evidence of that defendant's profits or financial condition until after the trier of
27 fact returns a verdict for plaintiff awarding actual damages and finds that a
28 defendant is guilty of malice, oppression, or fraud in accordance with Section
3294. Evidence of profit and financial condition shall be admissible only as to
the defendant or defendants found to be liable to the plaintiff and to be guilty

1 has been established. Plaintiff opposes citing to Hangarter, 373 F.3d at 1021 where
2 the Ninth Circuit held that the district court did not abuse its discretion in trying the
3 issues of liability for contract damages and liability for punitive damages for
4 tortious breach of that contract together.

5 A district court sitting in a diversity case applies federal procedural law and
6 state substantive law. Hanna v. Plumer, 380 U.S. 460, 465 (1965). Bifurcation is a
7 procedural issue governed by the Federal Rules of Civil Procedure, not state law.
8 Hamm v. American Home Prods. Corp., 888 F. Supp. 1037, 1038 (E.D. Cal. 1995)
9 (Rule 42(b) governs the bifurcation of evidence of defendants' net worth from
10 liability evidence rather than California Civil Code § 3295(d)); Hayes v. Arthur
11 Young & Co., Nos. 91-15531, 91-15546 and 91-15593, 1994 WL 463493, at *7,
12 (9th Cir. Aug. 26, 1994) (district court did err in applying Rule 42(b), rather than
13 Cal. Civ. Code section 3295(d) to rule on bifurcation); see also Simpson v.
14 Pittsburgh Corning Corp., 901 F.2d 277, 283 (2d Cir. 1990) (applying Rule 42(b)
15 instead of New York common law requiring that evidence of defendant's wealth be
16 admitted only after jury has otherwise determined that punitive damages are
17 appropriate); Rosales v. Honda Motor Co., Ltd., 726 F.2d 259, 261 (5th Cir. 1984)
18 (applying Rule 42(b) instead of Texas law requiring that liability and damages be
19 tried in a single proceeding).

20 Here, while Defendants recognize Rule 42 is a procedural rule, they contend
21 that the Court should consider the prejudicial effect of introducing their financial
22 condition during the trial as it may taint the jury's determining on liability and on
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24 FOOTNOTE CONTINUED FROM PREVIOUS PAGE

25 of malice, oppression, or fraud. Evidence of profit and financial condition shall
26 be presented to the same trier of fact that found for the plaintiff and found one
27 or more defendants guilty of malice, oppression, or fraud.

28 Cal. Civil Code § 3295(d).

1 the issues of oppression, fraud or malice. In Hangarter, the Ninth Circuit held that
2 the trial court did not abuse its discretion in not bifurcating liability and punitive
3 damages noting the defendants' financial condition was relevant to the plaintiff's
4 claim for breach of contract. Hangarter, 373 F.3d at 1021. In this case, the parties
5 do not assert and it does not appear that Defendants' financial condition has any
6 relevance to Plaintiff's causes of action.

7 The Court agrees that the issues of liability and punitive damages are
8 separable, allowing financial records that are not relevant to the underlying liability
9 trial would be prejudicial and bifurcation would conserve judicial resources. First,
10 the California Supreme Court has noted that a defendant's financial condition can
11 taint a jury's decision and weigh in favor of bifurcation. Adams v. Murakami, 54
12 Cal. 3d 105, 120 (1991) ("Requiring a defendant to prove his or her own financial
13 condition may improperly taint the jury's decision whether to impose punitive
14 damages in the first instance"). Next, the difference in the evidence and
15 burdens of proof to demonstrate liability and punitive damages weigh in favor of
16 bifurcation. See Norwood v. Children and Youth Servs., Inc., Case No. CV 10-
17 7944 GAF (MANx), 2012 WL 12882757, at *3 (C.D. Cal. July 27, 2012) (noting
18 differences in proving elements of negligence and punitive damages claim as well
19 as differences in the burden of proving punitive damages by clear and convincing
20 evidence and proving negligence by a preponderance of the evidence); Katsaros v.
21 Cody, 744 F.2d 270, 278 (2d Cir.), cert. denied, 469 U.S. 1072 (1984) (bifurcation
22 warranted if the two phases involve different types of evidence); Helminski v.
23 Ayerst Lab., a Div. of American Home Prods. Corp., 766 F.2d 208, 212 (6th Cir.),
24 cert. denied, 474 U.S. 981 (1985) (bifurcation "is appropriate when 'the evidence
25 pertinent to the two issues is wholly unrelated' and the evidence relevant to the
26 damages issue could have a prejudicial impact upon the jury's liability
27 determination.").

28 Under Rule 42(b), the Court concludes that bifurcation of punitive damages is

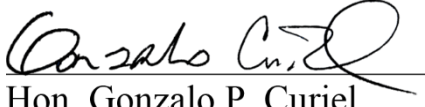
1 warranted, and the Court GRANTS Defendants' motion to bifurcate the issue of
2 punitive damages from the trial on liability and damages.

3 **Conclusion**

4 Based on the above, the Court DENIES Defendants' motion to bifurcate trial
5 between liability and damages but GRANTS Defendants' motion to bifurcate the
6 issue of punitive damages from the trial on liability and damages.

7 IT IS SO ORDERED.

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9 DATED: NOVEMBER 14, 2017

10 
11 Hon. Gonzalo P. Curiel
12 United States District Judge
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